No. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1966

GEORGE WILLIAM BRUTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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The judgment of the court of appeals affirming petitioner's conviction was entered on March 22, 1967. On May 11, 1967, petitioner applied for an extension of time within which to petition for a writ of certiorari. The extension was granted by Mr. Justice White—but without prejudice to consideration of the timeliness of the petition—and the petition was filed on May 16, 1967. Since the extension was sought

more than 30 days after the entry of judgment, the petition is out of time under Rules 22(2) and 34(2) of the Rules of this Court. In any event, there is no occasion for further review.

Petitioner was convicted in the United States District Court for the Eastern District of Missouri of assaulting an operator of a Post Office Contract Station, in violation of 18 U.S.C. 2114. On July 1, 1966, he was sentenced to imprisonment for twenty-five years.

The government's evidence showed that on April 6, 1965, one Shirley Miller was an employee of Robinson Jewelry Company and was authorized to and did operate a Post Office Contract Station at that location (Tr. 88-89). At approximately 4:00 p.m., two men, later identified as petitioner and defendant Evans (Tr. 93, 96-97), entered the store, and Evans asked to look at some engagement rings (Tr. 90, 92-93). After a short discussion, Evans asked to look at some watches, and, as Miss Miller began to display the watches, both men drew guns (Tr. 93-94). Evans proceeded to a rear office, pointed his gun at Paul Robinson, owner of the store, and announced that it was a "holdup" (Tr. 95-96). Petitioner, in the meantime, restrained Miss Miller in the front part of the store at gun point (Tr. 96-97). Petitioner then directed her towards the rear of the store, where she found Robinson lying face down on the floor. She too was directed to lie down, and petitioner and Evans removed cash from the cash register and other items from display cases. Miss Miller and Robinson were

then tied up, and petitioner and Evans fled through the rear door (Tr. 97-101). A subsequent inventory revealed that more than $30 in government funds had been taken from the contract station (Tr. 102-104). Approximately one year later, Miss Miller identified petitioner in a police lineup (Tr. 108-109).[1]

Defendant Evans was arrested by local police on March 22, 1966, on a State charge in connection with a robbery of a Western Union Office (Tr. 9, 51). After he had been identified in a lineup by Miss Miller and Robinson, Detective Farmer of the St. Louis Metropolitan Police Department questioned him about his involvement in the robbery of the postal substation. On April 8, not having been warned of his right to remain silent and to assistance of counsel, Evans orally admitted his participation in that crime (Tr. 29-30, 37). On April 11, Postal Inspector Thorn interviewed Evans in the City Jail. He advised Evans of his right to remain silent and to assistance of counsel. Evans stated that he had retained counsel but that he was willing to answer questions (Tr. 3-7, 168-171). Evans again admitted his participation in the crime (Tr. 171). After Evans was brought before a United States Commissioner for a preliminary hearing, he was again interviewed on May 4 by Thorn. After being advised of his right to remain silent and to assistance of counsel, he again admitted

[1] Miss Miller testified that she had not identified petitioner at an earlier lineup because on that occasion petitioner's bad eye, which she distinctively remembered from the robbery, had cleared up. At the second lineup, the eye was in the same condition as on the date of the robbery (Tr. 108-111).

his participation, adding that petitioner was his confederate (Tr. 172-173).

A pre-trial motion to suppress the admissions, heard on June 20, 1966, was denied (Tr. 80). At trial, Detective Farmer did not testify to the admission he had obtained on April 8, but Inspector Thorn, without objection from petitioner, testified to the statements Thorn had obtained on April 11 and May 4, the latter of which implicated petitioner (Tr. 171-172, 173). At the conclusion of the government's case and again in the formal charge, the court instructed the jury that it could not consider Evans' admissions when determining the guilt or innocence of petitioner.[2]

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[2] At the conclusion of the government's case, the court cautioned (Tr. 201):

> Gentlemen of the jury, I would like to say to you at this time yesterday there was testimony here with respect to a statement made by the defendant Evans to Thorn, the Postal Inspector, in the presence of, at least in one instance, in the presence of Detective Farmer, and some reference to a second statement that was made only in the presence of Thorn. That statement, which I will instruct you about in the instructions, if used, can only be used against the defendant Evans. It is hearsay insofar as the defendant Bruton is concerned, and you are not to consider it in any respect to the defendant Bruton, because insofar as he is concerned it is hearsay.

In the formal charge, the court again instructed, *inter alia* (Tr. 245, 246):

> A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntary and intentionally made by the de-

On appeal from their convictions, the court below held that the interrogation of Evans by the local detective on April 8, when Evans first admitted his participation in the crime, did not comply with the standards prescribed in this Court's opinion in *Miranda* v. *Arizona*, 384 U.S. 436—standards applicable to this trial, which commenced on June 20, 1966. It further held that the subsequent statements made to Inspector Thorn, although made after the proper warnings had been given, were tainted by the previous admission made to Detective Farmer.[3] The court thus concluded

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fendant Evans, you should consider it as evidence against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.

* * * *

It is your duty to give separate, personal consideration to the cause of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him.

[3] This finding, which we accept for purposes of this opposition, was not, in our view, an inevitable one. As government counsel pointed out in the hearing on the motion to suppress (Tr. 77-78), this Court had stated in the *Miranda* opinion (384 U.S. at 496):

We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed

that all of the statements were inadmissible and remanded Evans' case for a new trial. At the same time, the court affirmed petitioner's conviction, noting that he had not moved for a severance, that there was substantial evidence of his guilt independent of Evans' admissions and that the trial court's limiting instructions had been clear and precise. This ruling was proper.

After the trial court had denied Evans' motion to suppress and ruled two of his statements admissible, petitioner could have moved for a severance under Rule 14 of the Federal Rules of Criminal Procedure. See *Barton* v. *United States*, 263 F. 2d 894 (C.A. 5); *Schaffer* v. *United States*, 221 F. 2d 17, 19 (C.A. 5). He did not.[4] Moreover, the other evidence against petitioner—which included the positive identification by Miss Miller—was clearly sufficient to convict. Finally, the court's limiting instructions, given at the conclusion of the government's case, and again in the

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both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them.

The May 4 admission—the only one implicating petitioner—was made after Evans had had a preliminary hearing before a United States Commissioner at which he was fully apprised of his rights. We note, also, that the initial interrogation by Detective Farmer followed the *Miranda* decision by only one week—at a time, perhaps, when not all local authorities were as yet fully informed of its requirements.

[4] Petitioner suggests (Pet. 6) that he did not move for a severance because he assumed that Evans' statements were inadmissible. But this assumption must have been dispelled by the denial of the motion to suppress.

formal charge, were clear and unequivocal, and there is no indication that the jury was confused with respect to those instructions.

We stress that the government's case, lasting but two days, was simple in character, and the part of each defendant was easily understood. There was no mass trial and no proliferation of evidentiary restrictions that the jury might have had trouble understanding. The separate interests of each defendant were emphasized through the trial, each defendant being represented by his own attorney. And the statements of Evans, along with evidence of the circumstances surrounding the taking of them, were introduced at the conclusion of the government's case and were clearly segregated from the other evidence introduced against petitioner. In these circumstances, it may be presumed that the jury followed the court's instructions, and did not consider the incriminating statements in determining petitioner's guilt. *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Haggard* v. *United States*, 369 F. 2d 968, 975 (C.A. 8); *United States* v. *Gardner*, 347 F. 2d 405, 406-407 (C.A. 7), certiorari denied, 382 U.S. 1015; see, also, *Opper* v. *United States*, 348 U.S. 84.[5]

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[5] The Court of Appeals for the District of Columbia Circuit, in the exercise of its special power to make rules for that circuit, has held that it will reverse the conviction of a co-defendant if a confession by one defendant is held inadmissible. *Greenwell* v. *United States*, 336 F.2d 962 (C.A. D.C.); *Jones* v. *United States*, 342 F.2d 863 (C.A.D.C.). These decisions, although they distinguish *Delli Paoli* on the ground that the confession there was admissible, are based